

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HAROLD LEE GREENE, JR.,

Defendant-Appellee.

UNPUBLISHED

June 5, 2014

No. 314323

Wayne Circuit Court

LC No. 04-002996-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's ruling that defendant was permitted to withdraw his 2004 nolo contendere plea to attempted third-degree criminal sexual conduct. We reverse.

I. FACTUAL BACKGROUND

In 2004, defendant pleaded nolo contendere to attempted third-degree criminal sexual conduct and received two years' probation.¹ Approximately a week after the order of probation was entered, the terms were amended to reflect that defendant was required to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.* Defendant did not object to this amendment, and was discharged from probation in 2006.

However, in 2012, defendant filed a motion to withdraw his plea pursuant to MCR 6.500. Defendant argued that his defense counsel failed to inform him that his plea could result in registration as a sex offender. Thus, defendant argued his guilty plea was invalid. Over the prosecution's objections, the trial court granted defendant's motion. The prosecution now appeals.

II. SEX OFFENSE REGISTRY

A. STANDARD OF REVIEW

¹ The factual circumstances of the crime are not relevant for this appeal.

We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.*

B. ANALYSIS

Criminal defendants have the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). "When a defendant argues ineffective assistance of counsel in the context of a guilty plea, the defendant is essentially arguing that counsel failed to provide sufficient information regarding the consequences, elements, or possible defenses of the plea." *Fonville*, 291 Mich App at 384 (quotation marks, citation, and brackets omitted). To be adequately informed, a defendant must know the direct consequences of a guilty plea. *Id.* at 384-385. If the defendant has insufficient information, "the plea would be unknowing and, consequently, involuntary." *Id.* at 384 (quotation marks and citation omitted).

Of initial significance is the United States Supreme Court opinion in *Padilla v Kentucky*, 559 US 356, 366; 130 S Ct 1473; 176 L Ed 2d 284 (2010). In discussing counsel's role during plea negotiations, the Court in *Padilla* held that the defense counsel's performance fell below an objective standard of reasonableness because he failed to advise his client of the risk of deportation, "when the deportation consequence is truly clear." *Id.* at 369.

Subsequently in *Fonville*, *supra*, the Michigan Court of Appeals considered whether registration as a sex offender, like deportation, was a consequence of a guilty plea, of which defense counsel was obligated to inform his client. Ultimately, this Court held that "applying the *Padilla* rationale to this case supports a holding that defense counsel must advise a defendant that registration as a sexual offender is a consequence of the defendant's guilty plea." *Fonville*, 291 Mich App at 392.

However, in *People v Gomez*, 295 Mich App 411, 418-419; 820 NW2d 217 (2012), this Court held that the rule announced in *Padilla*, decided in 2010, only applied prospectively. Likewise in *Fonville*, 291 Mich App at 393, this Court clarified that it was not applying *Padilla* retroactively in the context of the sex offense registry, but merely was borrowing from *Padilla's* logic and rationale.

In the instant case, the trial court ruled in defendant's favor because it found *Fonville* to be "more specific" and persuasive because it was decided after *Gomez*. However, *Fonville* (2011) was decided before *Gomez* (2012). Further, the issue was not whether to apply *Gomez* or *Fonville*. Rather, the relevant inquiry is whether *Fonville*, which relied on *Padilla*, should be applied retroactively. As noted above, we have limited *Padilla* so that it applies only prospectively, *Gomez*, *supra*, and have clarified that we are not applying *Padilla* retroactively in the context of the sex offense registry, *Fonville*, *supra*.

Therefore, we agree with the prosecution that the trial court erred in applying the rule articulated in *Padilla* and *Fonville* retroactively.²

III. CONCLUSION

The trial court erred in ruling that defendant was entitled to withdraw his plea. We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood

² The prosecution requests a conflict panel, arguing that *Fonville* was wrongly decided because it impermissibly extended *Padilla* beyond the scope of deportation. We decline to address that issue because we agree with the prosecution that *Fonville* cannot be retroactively applied in this case. The prosecution also suggests that this case should be held in abeyance pending the Michigan Supreme Court's decision in *People v Bullock*, 836 NW2d 155 (2013). However, the Court denied leave in that case. See *People v Bullock*, 495 Mich 912; 840 NW2d 327 (2013).